IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-627

JOSEPH B. NEWCOMER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

In Holding Newcomer's Written and Oral Communications with the Department of Labor Were Insufficient to Fulfill the Notice of Intent to Sue Requirements of 29 U.S.C. §626(d)(1), The Fifth Circuit Rendered a Decision In Conflict with the Basic Objectives and Rationale Underlying the Age Discrimination in Employment Act of 1967. 6

CONCLUSION 14

APPENDIX

Appendix I-Judgment and Opinion of the Fifth Circuit 1a

Appendix II-Order of the United States District Court for the Northern District of Georgia 5a

TABLE OF AUTHORITIES

Cases:

Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977) 10,13

Charlier v. S.C. Johnson & Son, Inc., 556 F. 761, (5th Cir. 1977) 7,13

Dartt v. Shell Oil Company, 539 F.2d 1256 (10th Cir. 1976) 8,12,13

Edwards v. Kaiser Aluminum and Chemical Sales, 515 F.2d 1195 (5th Cir. 1975) 7

Goger v. H.K. Porter Co., Inc., 492 F.2d 13 (3rd Cir. 1974) 6

Haynes v. United States, 390 U.S. 85 (1968) 10

Hiscott v. General Electric Co., 521 F.2d 632 (6th Cir. 1973) 10

Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3rd Cir. 1978) 6,7

Love v. Pullman, 404 U.S. 522 (1972) 7,14

Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975) 12,13

Noto v. J.F.D. Electronic Corp., 456 F. Supp. (E.D.N.C. 1978) 11

Ott v. Midland-Ross Corp., 323 F.2d 1367 (6th Cir. 1973) 10

Pandas v. Sircorsky Aircraft Division of United Technologies Corp., 431 F. Supp. 793 (D. Conn. 1978) 12

Powell v. Southwestern Bell Telephone Company, 494 F.2d 485 (5th Cir. 1974) 7,10,12,13,14

Quina v. Owens-Corning Fiberglas Corp., 575 F.2d 1115 (5th Cir. 1978) 7

Thomas v. E.I. DuPont de Lemours & Co., Inc., 574 F.2d 1324 (5th Cir. 1978) 7

Womble v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973) 12

Statutes:

United States Code

29 U.S.C.A. §626(d) (1967) (Amended 1978) ..... *passim*

29 U.S.C.A. §626(d) (1967) as amended by The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §4, 92 Stat. 190 3,4

Legislative History

S.R. No. 95-493, 95th Cong., 2nd Sess., 12, Reprinted in (1978) U.S. Code Cong. & Ad. News 987 10,11

H. Conf. R. No. 95-950, 95th Cong., 2nd Sess., 12, Reprinted in (1978) U.S. Code Cong. & Ad. News 1006 9

IN THE

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OCTOBER TERM, 1979

No.

JOSEPH B. NEWCOMER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Joseph B. Newcomer, respectfully prays a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 12, 1979.

OPINIONS BELOW

The opinion of The Court of Appeals, affirming the judgment of The District Court for the Northern District of Georgia, is printed in Appendix I hereto and is reported at 598 F.2d 969 (5th Cir. 1979). The opinion of The United States District Court for the Northern District of Georgia granting Respondent's Motion for Summary Judgment is printed in Appendix II hereto.

JURISDICTION

The order of The Court of Appeals, printed in Appendix "I" hereto, was entered on July 12, 1979. This Petition for a writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court below erred in its conclusion the Petitioner, Joseph B. Newcomer, failed to provide the United States Department of Labor with notice of an attempt to file private suit against International Business Machines Corporation, as required by 29 U.S.C. §626(d)(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. §626(d)
No civil action may be commenced by any individual

under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed–

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. §626(d) as amended by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 §4b, 92 Stat. 190

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a change shall be filed–

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

This is an action brought pursuant to the Age Discrimination In Employment Act of 1967, 29 U.S.C. §621 *et seq* and the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq*. Petitioner, Joseph B. Newcomer, in his complaint filed November 16, 1977, alleged age discrimination on the part of International Business Machines Corporation ("IBM").

Newcomer worked for IBM as a customer engineer and later as a Senior Administrative Specialist from March 16, 1945 until July 1, 1975. During the latter years of his employment, Newcomer persistently attempted to gain higher paying positions or salary increases from IBM. His attempts met with no success and he determined his lack of success to be due to age discrimination on the part of IBM. On February 24, 1975, Newcomer sent a letter to the Department of Labor complaining of the discrimination and asking for their assistance in alleviating the same. On April 24, 1975, Newcomer again wrote the Department of Labor requesting facts which he felt would substantiate age discrimination within IBM. During this period, Newcomer engaged in several conversations with the Department of Labor concerning such age discrimination. After Newcomer retired from IBM because of his inability to obtain promotions or salary increases, he

filed a two page complaint with the Department of Labor. On March 1, 1977, the Department of Labor informed Newcomer they had concluded all conciliatory and investigative efforts on his behalf and that no discrimination had been found on the part of IBM. In that same letter, they informed Newcomer his period for filing Notice of Intent to Sue pursuant to 29 U.S.C. §626(d)(1) had expired. Newcomer was aware of a 180 day notice requirement. He was also aware the Department of Labor had undertaken conciliatory and investigative efforts on his behalf with IBM. He therefore assumed he had fulfilled the notice requirements of ADEA. The Department of Labor's letter of March 1, 1977 to Newcomer was the first notice Newcomer received that his letters to and communications with the Department of Labor might not fulfill the notice provisions of the ADEA.

IBM moved for summary judgment based on the contention Newcomer failed to give notice within 180 days of the allegedly discriminatory activity to the Department of Labor pursuant to 29 U.S.C. §626(d)(1). On August 31, 1978, Judge Richard C. Freeman of the Northern District of Georgia granted IBM's Motion for Summary Judgment based upon Newcomer's failure to satisfy the Notice provision of the ADEA. On September 28, 1978, Newcomer filed a Notice of Appeal to the United States Court of Appeals, Fifth Circuit, from the Order granting IBM's Motion for Summary Judgment. On July 12, 1979, the United States Court of Appeals, Fifth Circuit, confirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

(1) IN HOLDING NEWCOMER'S WRITTEN AND ORAL COMMUNICATIONS WITH THE DEPARTMENT OF LABOR WERE INSUFFICIENT TO FULFILL THE NOTICE OF INTENT TO SUE REQUIREMENTS OF 29 U.S.C. §626(d)(1), THE FIFTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH THE BASIC OBJECTIVES AND RATIONALE UNDERLYING THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Newcomer's argument is based upon the premise the Age Discrimination in Employment Act of 1967, ("ADEA"), "is remedial legislation and is entitled to be liberally construed; as such, in absence of congressional expression, courts should be chary about creating unnecessary procedural bars which may, at outset, require dismissal of otherwise meritorious age discrimination claims". *Holliday v. Ketchum, MacLeod and Grove, Inc.*, 584 F.2d 1221 (3rd Cir. 1978). In *Holliday* the court rejected the decisions of a preceding case, *Goger v. H.K. Porter Co., Inc.*, 494 F.2d 13 (3rd Cir. 1974) and overruled the District Court's dismissal of the action. The issue in *Holliday* was whether an individual charging a violation of the ADEA must first utilize state remedies before filing a suit in Federal Court. The Third Circuit based their reversal on "valid public policy concerns, congressional prediliction, and our own unease with the judicial impediment through remedial legislation". 584 F.2d at 1230.

The Fifth Circuit's decision in the present action places a restraint on legislation enacted to remedy age

discrimination. Newcomer's contention is further supported by the rationale and decision of this Court in *Love v. Pullman*, 404 U.S. 522 (1972). The issue in *Love v. Pullman*, concerned the notice requirements of Title VII of the Civil Rights Act of 1964, 78 Stat. 253. The Petitioner failed to file his complaint with the EEOC in conformity with the requirements of the Civil Rights Act. This Court reversed the lower court's decision and found in favor of the Petitioner, reasoning where the notice, as given, fulfills the purpose of the notice provision, and where the Respondent makes no showing of prejudice to its interests, to require a second filing of notice by the aggrieved party "would serve no purpose other than the creation of an additional procedural technicality". 404 U.S. at 525-526. This Court went on to state "such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process". *Id.* at *526.*

The rationale used by this Court in *Love* and the Third Circuit in *Holliday* is consistent with the intent of the 1967 Congress in enacting the ADEA and is the same rationale which should have been used by the Fifth Circuit in their determination of this case.

The Fifth Circuit has been very restrictive in its interpretation of the procedural requirements of the ADEA. See *Powell v. Southwestern Bell Telephone Company*, 494 F.2d 485 (5th Cir. 1974); *Charlier v. S.C. Johnson and Son, Inc.*, 552 F.2d 761 (5th Cir. 1977); *Edwards v. Kaiser Aluminum and Chemical Sales*, 515 F.2d 1195 (5th Cir. 1975); *Quina v. Owens Corning Fiberglass, Corp.*, 575 F.2d 1115 (5th Cir. 1978); *Thomas v. E.I. DuPont, D. Del LaMors and Co., Inc.*, 574 F.2d 1324 (5th Cir. 1978). Such a restrictive

interpretation of the procedural requirements of the ADEA ignores public policy and the intent of the 1967 Congress in enacting the ADEA.

The purposes for requiring an employee to give a Notice of Intent to Sue to the Department of Labor within 180 days of alleged and unlawful age discrimination are to provide the Labor Department with an opportunity to investigate the alleged wrongful discrimination and to achieve an informal reconciliation between the parties while the facts are fresh; to inform the employer of a possible lawsuit based on the alleged discrimination; and to decide whether to sue in behalf of the aggrieved party. *Dartt v. Shell Oil Company*, 539 F.2d 1256 (10th Cir. 1976), *aff'd mem.*, 434 U.S. 99 (1977) (equally divided court).

In the present action Newcomer contacted the Department of Labor by letters dated February 24, 1975 and April 4, 1975 and by several telephone conversations alleging I.B.M. was guilty of age discrimination. In response to Newcomer's complaints, I.B.M. was contacted by the Department of Labor and an investigation of Newcomer's allegations was commenced. Although the Department stated they found no evidence of age discrimination, and, therefore, would not institute an action on behalf of Newcomer, the notice given by Newcomer obviously fulfilled the basic purposes and satisfied the spirit and letter of 29 U.S.C. §626(d)(1).

This statement is supported by several recently enacted amendments to the ADEA. One such amendment amends in part 29 U.S.C. §626(d) to read as follows:

> "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed:
>
> (1) Within 180 days after the alleged unlawful practice occurred. (Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 §4b, 92 Stat. 190, (amending 29 U.S.C. §626(d)."

When compared to the original language of §626(d)(1) one finds the only change is to substitute "charge alleging unlawful discrimination" for "notice of intent to file suit". A review of the legislative history regarding the amendment indicates:

> "This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory." (H. Conf. R. No. 95-950, 95th Cong., 2nd Sess., 12, reprinted in (1978) U.S. Code Cong. & Ad. News 1006.)

Obviously, Newcomer's letters and telephone calls to the Department of Labor satisfy the notice requirements of §626(d)(1) as amended in 1978. Of more importance in the present action, the legislative history surrounding the new amendment strongly infers the previous legislative intent, in requiring "a notice of intent to sue", was to require no more than a "charge" as defined above.

Although the general rule is the views of a later

Congress provide no controlling basis for inferring the intent of an earlier Congress, *Haynes v. United States*, 390 U.S. 85, 87 (1968), Newcomer contends there are several reasons for finding the views of the 1978 Congress do in fact reflect the intent of the 1967 Congress.

First, there was no definite legislative language underlying the notice provisions of the 1967 ADEA. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 192 (3rd Cir. 1977). Because of the recent amendment to the ADEA there is now an interpretation which was feasible, if not preferable, prior to the amendments and which has been ratified by the legislators assigned to recommend such changes.

Second, the legislative language of both the House and the Senate in adopting the 1978 amendments imply the interpretation placed on the notice requirements by the courts was erroneous. For example, as stated in S.R. No. 95-493, 95th Cong., 2nd Sess., 12, reprinted in (1978) U.S. Code Cong. & Ad. News 987:

> "Failure to timely file a notice as required by §7d has been the most common basis for dismissal of ADEA lawsuits by private individuals. The 180 day limit has been interpretated as jurisdictional by some courts, and consequently complaints were dismissed. See, *e.g., Ott v. Midland-Ross Corp.*, 323 F.2d 1367 (6th Cir. 1973); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1973); and *Powell v. Southwestern Bell Co.*, 494 F.2d 485 (5th Cir. 1974). In the Committee's view, this provides a compelling argument for removing the 180 day notice requirement entirely. Age discrimination is often much more subtle and less well understood than other forms of discrimination and therefore often not discovered by the victim until long after the alleged act has occurred. Furthermore, under this amendment, neither the complainant who fails to file notice within 180 days nor the prospective defendant will have to go through the prolonged uncertainty now experienced in waiting for the court to rule whether the failure to file a notice within 180 days may be excused."

This language certainly intimates legislative disapproval of the interpretation the courts have placed on the 180 day notice requirements.

Additionally, the legislative history states:

> "The basic purpose of the notice requirement is to apprise the Department of Labor of any alleged violations of the Act so that the Department may notify prospective Defendants and to provide the Department with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation." (S.R. No. 95-493, 95th Cong., 2nd Sess., 12, reprinted in (1978) U.S. Code Cong. & Ad. News, 987).

Thus the purpose remains the same but the phrase "a notice of intent to sue" becomes "charge", a further indication the 1967 Congress intended for the phrase "notice of intent to sue" to mean "charge" as defined under the 1978 amendments to the ADEA.

A number of cases initiated prior to the effective date of the 1978 Amendment to §626(d)(1) of the ADEA, have interpreted "notice of intent to sue" to mean "charge".

The court in *Noto v. JFD Electronic Corp.*, 456 F. Supp. 92 (E.D.N.C. 1978) determined sufficient oral notice of intent to sue could fulfill the requirements of §626(d)(1).

In *Pandis v. Sircorsky Aircraft Division of United Technologies Corp.*, 431 F. Supp. 793 (D. Conn. 1978) the court found that a hand written letter complaining of age discrimination fulfilled the notice of intent to sue requirements of §626(d)(1). In so finding, the *Pandis* court stated "The trend has been to construe the act liberally on behalf of the plaintiff to effectuate the act's remedial purposes. 'A procedural requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act.' *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). It is not necessary for a complainant in so many words to declare an intent to file a civil action." 431 F. Supp. at 799. The *Pandis* court further reasoned "It would further no purpose of the Act to require slavish adherence to the 'intent' language of §626(d)." 431 F. Supp. at 799.

In *Smith v. Joe Schlitz Brewing Co.*, 419 F. Supp. 700 (D.N.J. 1976), the plaintiff initially lodged an oral complaint with the Department of Labor and filed a letter of complaint with the area director of Wage and Hour Division of the Department of Labor. In that action the plaintiff conceded that neither the oral complaint nor the letter specifically set forth an intent to sue. The court in its determination, while agreeing with both *Powell* and *Dartt* that the 180 day filing requirement is jurisdictional, stated the plaintiff's letters and oral communications with the Department of Labor satisfied the requirements of the ADEA.

In *Womble v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973), a similar question arose concerning the ADEA notice requirements. In finding oral com-

munications with the Department of Labor fulfilled the notice requirement of the ADEA, the court stated "where an employee identified himself and his employer and reports facts which, if true, would support a cause of action pursuant to the Act, the Labor Department should assume the aggrieved employee will take whatever steps are necessary to enforce his rights, including court actions; thus, an intent to file suit is implied in a complaint of age discrimination in employment". *Id.* at 915.

In holding Newcomer's communications with the Department of Labor did not fulfill the notice requirement of §626(d)(1), the Fifth Circuit resolved the obvious ambiguity of the "notice of intent to sue" requirement in favor of the employer. Such a determination is an unwarranted restraint on remedial legislation. "A procedural requirement of the Age Discrimination Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act." *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975).

That a restrictive interpretation of the notice requirements of §626(d)(1) violated the intent of Congress in enacting the age Act is further buttressed by a number of cases which have avoided an inequitable dismissal of lawsuits by finding an equitable reason to toll the notice provisions of the ADEA. See *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976); *Bohnam v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977); *Charlier v. S.C. Johnson & Son Inc.*, 556 F.2d 761 (5th Cir. 1977). These courts reverted to equitable doctrines to avoid the results of *Powell v. Southwestern*

Telephone Co., supra, which required a restrictive application of §626(d)(1) and the other notice provisions of the ADEA.

CONCLUSION

This court should grant certiorari to resolve the conflict between the Fifth Circuit's restrictive interpretation of §626(d)(1) and the more equitable interpretation evidenced by rationale in *Love v. Pullman, supra,* various circuit and district court decisions cited above and the intent of congress in enacting the ADEA.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 78-3442
Summary Calendar.*

Joseph B. NEWCOMER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,
Defendant-Appellee.

July 12, 1979.

In age discrimination suit, summary judgment for employer was granted by the United States District Court for the Northern District of Georgia, at Atlanta, Richard C. Freeman, J., and plaintiff appealed. The Court of Appeals held that employee, who was aware of 180-day notice requirement, failed to give sufficient notice of intent to sue under the Age Discrimination in Employment Act where in none of his letters to the Department of Labor did he ever indicate that he intended to file a civil discrimination suit against his employer.

Affirmed.

1. Labor Relations

Notice of intent to sue is a jurisdictional prerequisite

*Rule 18, 5 Cir.; see *Isbell Enterprises, v. Citizens Casualty Co. of New York, et al.,* 5 Cir., 1970, 431 F. 2nd 409, Part I.

to age discrimination suit. Age Discrimination in Employment Act of 1967, §7(d)(1) as amended 29 U.S.C.A. §626(d)(1).

2. Labor Relations

Employee, who was aware of 180-day notice requirement, failed to give sufficient notice of intent to sue under the Age Discrimination in Employment Act where in none of his letters to the Department of Labor did he ever indicate that he intended to file a civil discrimination suit against his employer. Age Discrimination in Employment Act of 1967, §7(d)(1) as amended 29 U.S.C.A. §626(d)(1).

3. Labor Relations

1978 amendments to notice provision of the Age Discrimination in Employment act concern equitable tolling of time period for filing of notice, not waiver of the notice itself. Age Discrimination in Employment Act of 1967, §7(d)(1) as amended 29 U.S.C.A. §626(d)(1).

Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

Newcomer filed an age discrimination suit. Summary judgment was granted for IBM on the ground that Newcomer had failed to satisfy the notice requirements of 29 U.S.C. §626(d)(1).

(1,2) In 1975, when Newcomer first wrote the Department of Labor, §626(d)(1) provided that one could not file a civil action until he had given the Secretary 60 days' notice, filed within 180 days after the alleged unlawful practice occurred. At no time did

he file with the Secretary a formal notice of intent to sue, and the district court granted summary judgment for this reason. The notice of intent to sue is a jurisdictional prerequisite to suit.[1] Newcomer seeks to escape this bar on the basis of *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 914-15 (N.D. Ga., 1973), which holds that the required notice need not be written and that if an employee merely notifies the Department of Labor within the 180-day period that he had been discharged because of age discrimination, he had given sufficient notice of intent to sue. *Woodford* is inconsistent with *Powell*, n. 1, *supra*, in which he held:

> We reject appellant's argument that her June 16, 1970 letter asking the Secretary to sue in her behalf constituted notice. Notice of a desire that an agency of the federal government commence litigation on one's behalf simply does not equate with notice of such an individual's personal intent to commence a private lawsuit.

494 F. 2nd at 485. In none of Newcomer's letters to the Department of Labor did he ever indicate the intention to file a civil discrimination suit against IBM. *See also Thomas v. E.I. DuPont de Nemours & Co., Inc.*, 574 F. 2nd 1324, 1330 (CA5, 1978). *Woodford* has been criticized in other circuits. *See Reich v. Dow Badische Co.*, 575 F. 2nd 363, 368 and cases cited (CA2, 1978), *cert. denied*, ____ U.S. ____ 99 S. Ct. 621, 58 L. Ed. 2nd 683 (1979).

Newcomer seeks to distinguish *Powell* because the plaintiff in *Powell* was expressly informed by the Department of Labor of the notice requirements while in the present case there was a conflicting fact question

[1] E.g., *Quina v. Owens-Corning Fiberglass Corp.*, 575 F. 2nd 1115 (CA5, 1978); *Powell v. Southwestern Bell Telephone Co.*, 494 F. 2nd 485 (CA5, 1974).

on this issue. However, it is undisputed that Newcomer was aware of the 180-day notice requirement.

(3) Second, Newcomer relies upon the 1978 amendments to §626(d)(1) as merely clarifying Congress's intent when it passed the original version of that section. This argument misses the mark because the 1978 amendments concern equitable tolling of the time period for filing notice, not the waiver of the notice itself. Here out concern is not timely filing but total lack of notice.

The summary judgment was proper. AFFIRMED.

APPENDIX II

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSEPH B. NEWCOMER	]	
	]	CIVIL ACTION
vs.	]	
	]	NO. 77-1848A
INTERNATIONAL BUSINESS	]	
MACHINES CORPORATION	]	

ORDER

This is an action for age discrimination, brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.*, and the Fair Labor Standards Act of 1938, 29 U.S.C. §§201 *et seq.* The plaintiff, a 63 year-old male, alleges that, because of his age, the defendant International Business Machines Corporation [hereinafter "IBM"] deprived him of deserved promotions and salary increases, and ultimately coerced him into accepting early retirement. He seeks the back pay that he claims he would have earned but for the alleged discrimination, and an award of punitive damages.

The action is now before the court on IBM's motion for summary judgment, Rule 56 Fed. R. Civ. P. IBM contends that the plaintiff has failed to satisfy a "jurisdictional" prerequisite to the bringing of an age discrimination suit. The plaintiff's claim is barred, IBM argues, because he never gave notice, within 180 days

of the allegedly discriminatory activity, to the United States Secretary of Labor of his intent to file suit, as required by 29 U.S.C. §626(d)(1).[1] The plaintiff concedes that to a certain extent he deviated from the formalities of the 180-day notice requirement, but proffers several theories under which he claims that the action he did take may be deemed to satisfy Section 626(d)(1).

The facts set forth below are not at issue, and form the basis for our judgment. Upon review of these facts, and the applicable case law, we hold that the plaintiff did not comply with the statutorily-mandated notice requirements, and GRANT IBM's motion for summary judgment.

From March 16, 1945, until March 1, 1968, the plaintiff worked as a Customer Engineer at IBM's Atlanta office. From 1968 through his retirement on July 1, 1975, he held the position of Senior Administrative Specialist. It was during the 1968-1975 period that the plaintiff engaged in a series of attempts to secure a higher paying position, or a salary increase, from IBM. His efforts met with no success and culminated, on February 24, 1975, in a complaint letter to the United States Department of Labor. In this letter the plaintiff set out a list of grievances dating back as far as 1962 and requested that the Department make

[1] The section provides, in pertinent part:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed–
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, . . .

several inquiries into IBM's promotion practices in the Southeast. Nowhere, however, did he give any explicit indication that he intended to bring a private civil action against IBM or take any other action on his own.

The Department of Labor responded by letter dated March 6, 1975. That response is apparently not part of the current record. According to letters from the Department to Senators John C. Danforth and Jacob K. Javitz, however, the March 6 communication, and others sent subsequent thereto, "fully informed [the plaintiff] of the procedural requirements and time limitations in the Act. . . ."

On April 24, 1975, the plaintiff again wrote to the Department of Labor. His letter, addressed to Mr. Charles Hansel,[2] requested that Mr. Hansel "make a chart of the local IBM employees listed on the attached sheet, which I am sure will demonstrate that age discrimination exists at IBM.". Once again, the letter contained no suggestion that its author intended to sue IBM.

Beginning at approximately the time of the plaintiff's first letter to the Department of Labor, the plaintiff also engaged in a number of oral conversations with staff at the Department of Labor. The plaintiff does not allege that in any of the conversations he gave notice of an intention to bring a civil action.

Following his retirement the plaintiff continued his contacts with the Department by filing, on November 4, 1976, an Employee Personal Interview Statement. This two-page complaint, made some 16 months after his retirement, described conversations the plaintiff had had with his supervisors, recited the reasons they had

[2] The record does not reveal Mr. Hansel's position with the Department of Labor.

given for refusing his promotions requests, and explained that he had retired in 1975 because of his inability to obtain a better paying job with IBM. The plaintiff's final letter to the Department of Labor, mailed on December 2, 1976, was a Freedom of Information Act request for a copy of the November 4 statement.

On March 1, 1977, the Department of Labor advised the plaintiff that it had concluded all of its conciliatory and investigative efforts on his behalf. Richard L. Gilbert, the Department's Assistant Area Director, wrote:

> Our additional investigation work at IBM's home office disclosed evidence that concluded that your age was not a factor that was considered by the firm in its non-selection of you in the transfers and promotions that you complained of.
>
> The Department of Labor can take no further action with respect to this matter. As you will note in the enforcement section of the enclosed pamphlet, the Act provides certain requirements with specific time periods governing the circumstances under which an individual may file his or her own suit. From the information available, the time period for you to file the required notice of intent to sue has expired.

IBM has submitted the affidavit of Michael F. Kelly, the plaintiff's supervisor at IBM from January 1975 through the time of the plaintiff's retirement. Mr. Kelly's affidavit states that at all times during this six-month period, copies of the Department of Labor's poster describing the Age Discrimination Act were displayed conspicuously throughout the Distribution Center where the plaintiff worked. In addition, the plaintiff's own affidavit states:

> Affiant was aware of a 180 day notice requirement prior to his notifying the Department of Labor of age discrimination on the part of his employer INTERNATIONAL BUSINESS MACHINES CORPORATION.

Despite his admitted actual knowledge that the Age Discrimination Act mandated notice of intent to file suit, the plaintiff never provided the Department of Labor with any explicit statement that he intended to bring a private civil action against IBM—either before his retirement, within 180 days of his retirement, or within 180 days of the Department's March 1, 1977 letter.

IBM asks the court to hold that as a matter of law the above facts demonstrate that the plaintiff has failed to complete the jurisdictional prerequisite of filing the 180-day notice of intent to sue, and that therefore IBM is entitled to summary judgment. In response, the plaintiff offers two theories under which he claims he is deemed to have fulfilled the notice requirement. First, he argues that his letters and conversations with the Department of Labor constitute sufficient compliance with the rule. Alternatively he contends that the Department's failure to inform him of the ineffectiveness of his communications operated to waive non-compliance.[3]

[3]The Joint New Case Statement filed by the parties on February 16, 1978, contains a third theory, that the 180-day period was "tolled" by the Department of Labor investigation and did not begin to run until March 1, 1977. We need not consider whether this situation falls within the narrow category of cases to which the Fifth Circuit has suggested that an equitable tolling theory might apply. *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (1975) (dictum). The plaintiff has not alleged he made any communication to the Department within 180 days of March 1, 1977, and appears now to have abandoned the argument.

The plaintiff's first argument fails under *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974). There, the appellant argued, *inter alia,* that a letter she had sent to the Secretary of Labor asking him to sue in her behalf constituted notice under the Act. The court rejected her contention, stating flatly that "[n]otice of a desire that an agency of the federal government commence litigation on one's behalf simply does not equate with notice of such an individual's personal intent to commence a private action." 494 F.2d at 485. *Accord, Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1312 (5th Cir. 1976); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1259 (10th Cir. 1976). We see no reason to hold that the plaintiff has done significantly more than the appellant in *Powell.* Indeed, to the extent that there can be found a meaningful distinction, it would seem that Mrs. Powell's request that the Secretary actually file suit on her behalf more closely resembles notice of intent to bring a private action than do the plaintiff's letters of complaint and requests for an administrative investigation.

The plaintiff responds to *Powell* by pointing to an earlier case, *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973), in which this court held that: (1) notice of intent to sue could be oral; and (2) a complaint to the Labor Department alleging age discrimination satisfied the notice requirement. The plaintiff contends that because the *Powell* opinion makes no reference to *Woodford,* the Court of Appeals must have considered *Woodford* distinguishable and *Woodford* must therefore remain good law. We disagree. There was no need in *Powell* to discuss explicitly a case whose holding was plainly being overruled. The language in *Powell,* quoted above, is broad and unambiguous; to the extent that *Woodford* sanctioned less than express notice of an intent to file a private action, it may no longer be followed.

The plaintiff also seeks to distinguish *Powell* on its facts and, in so doing, retreats to his second argument. He points out that the Department of Labor twice informed Mrs. Powell of the time limits governing her right to file suit. He contends that these warnings were critical to the decision; that in their absence, the case might have been decided differently; and that in this instance the Department's failure to warn him that his letters were ineffective should relieve him of any duty to supply the notice that would otherwise have been required.

We reject the plaintiff's argument for four reasons. First, the plaintiff exaggerates the significance of the fact that Mrs. Powell had been advised of the statutory deadlines. Nothing in the opinion suggests that this fact was important to the court's holding. Second, it would be asking a great deal of the Department of Labor to discern that a complaint letter is somehow intended to be more than it purports on its face to be. Requiring that the Department then judge the letter's sufficiency for performing the additional task, and render an opinion so informing the writer asks even more. This certainly goes beyond a reminder as to time limits, and we doubt that the law contemplates imposing such a duty.

In addition, it is true that at least one court has permitted an age discrimination action to proceed despite the plaintiff's failure to provide the 180-day notice, because of the employer's failure to display government posters describing the time limits, and because of the "newness" of the Age Discrimination

Act. *Bishop v. Jelleff Associates, Inc.*, 7 Empl. Prac. Dec. ¶9214 (D.D.C. 1974); *contra, Hiscott v. General Electric Co.*, 8 Empl. Prac Dec., ¶9735 (N.D. Ohio 1974). Here, however, we would be imputing to the employer the responsibility for any shortcomings on the part of the government. Such a course would extend a "waiver" theory far beyond its already questionable applicability. *See Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1312 (5th Cir. 1976).[4] Finally, we recall that by his own admission the plaintiff had actual knowledge of the notice requirement. His awareness makes this a particularly inappropriate situation in which to shift to the Department the onus for the plaintiff's failure to comply with the statutory directive.

We conclude that the plaintiff has failed to satisfy a necessary prerequisite to filing suit under the Age Discrimination Act, and that summary judgment must be entered in favor of IBM.

Accordingly, the motion of the defendant International Business Machines Corporation is hereby GRANTED.

IT IS SO ORDERED.

This, the 31st day of August, 1978.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

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[4]We note further that the concept of waiver is conceptually inconsistent with the holding in *Powell*, 494 F.2d at 487-88, that the 180-day notice is "jurisdictional."